IN THE HIGH COURT OF DELHI AT NEW DELHI

AA No.439/1999

Chunni Lal Proprietor
C.L.Constructions Company ...Petitioner through
Mr.B.S.Dhir, Advocate.

Versus

RPG Home Finance Pvt. Ltd. ...Respondent through
Mr.K.R.Chawla, Advocate.

Date of Hearing : 24th July, 2006

Date of Decision : 04th September, 2006

CORAM:
HON'BLE MR. JUSTICE VIKRAMAJIT SEN

1. Whether reporters of local papers may be allowed to see the Judgment? No

2. To be referred to the Reporter or not? No

3. Whether the judgment should be reported in the Digest? No

: VIKRAMAJIT SEN, J.

1. This litigation has fallen for consideration de novo for the second time. By Orders dated 23.7.2003, a

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Sole Arbitrator had been appointed by C.K.Mahajan, J. In the Order, it had been stated that the Respondent had failed to file Replies and to controvert the statement of facts and allegations made in the application. However, Replies had been filed by Respondent No.1 on 24th December, 1999 to which a Rejoinder had been filed by the Applicant on 8th May, 2000. These were overlooked since they had been wrongly filed by the Dealing Clerk in Part-II. The Orders dated 23.7.2003 appointing an Arbitrator came to be set aside by the Supreme Court on this short ground.

2. The existence of the following Arbitration Clause is not in dispute:

> "28. All disputes and differences of any kind whatever arising out of or in connection with the Contact or the carrying out of the works (whether during the progress of the works or after their completion and whether before or after the determination, abandonment or breach of the Contract) shall be referred to and settled by the Architect who shall state his decision in writing, such decision may be in the form of a final certificate or otherwise. The decision of the architect with respect to any of excepted matters shall be final and without appeal as stated in the preceding Clause. But, if either the Employer or the Contractor be dissatisfied with the decision of the Architect on any matter, question or dispute of

any kind (except any of the excepted matters) or as to the withholding by the Architect of any certificate to which the Contractor may claim to be entitled, then and in any such case either party (the Employer or the Contractor) may within twenty-eight days after receiving notice of such decision give a written notice to the other party through the Architect requiring that such matters in dispute be Arbitrated upon. Such written notice shall specify the matters which are in dispute and such dispute or difference of which such written notice has been given and no other shall be and is hereby referred to the Arbitration and final decision of a single Arbitrator being a Fellow of Indian Institute of Architects to be agreed upon and appointed by both the parties or in case of disagreement as to the appointment of a Single Arbitrator, to the Arbitration of two Arbitrators both being Fellows of the Indian Institute of Architects, one to be appointed by each party, which Arbitrator shall before taking upon themselves the burden of reference appoint an Umpire.

The Arbitrator, the Arbitrators or the umpire shall have power to open up, review and revise any Certificate, opinion, decision, requisition or notice, save in regard to the excepted matters referred to in preceding clause, and to determine all matters in dispute which shall be submitted to him or them and of which notice shall have been given as aforesaid....."

3. In brief, the Applicant has stated that the entire payment had not been made after the Sixth Running Bill had been cleared. In response to the Applicant's letter dated 25.8.1998, a Demand Draft of Rs.9,93,256/- had been

received, but a balance had been left outstanding. The Applicant's reminder dated 4.5.1999 failed to provide any results and efforts of the architect remained futile. As no Arbitrator had been appointed, the Applicant had filed the present application under Section 11 defining therein its claim for a sum of Rs.26,03,445/- with interest at the rate of 15% per annum.

4. In the Written Statement the Respondent has contended that the Petition is not maintainable as C.L. Construction Company is a sole proprietorship concern and is not a legal entity. A perusal of the Memorandum of Parties will disclose that the Petitioner has been arrayed as C.L. Construction Company through its proprietor Shri Chunni Lal who has signed the application and the Affidavit in support thereof. In this affidavit Shri Chunni Lal has stated that he is the Plaintiff. While the array of parties ought to have been fashioned as Shri Chunni Lal, sole proprietor of C.L. Construction Company, this hyper-technical objection deserves to be overruled. Order XXX Rule 10 specifically permits that a person carrying on

business in a name or style other than his own may be sued in such name or style as if it were a firm name. Thereafter the Petitioner can require the Defendant so arrayed to disclose the name and details of the owner. This is because Order XXX is made applicable to such cases.

5. The next preliminary objection pertains to the absence of territorial jurisdiction of the High Court of Delhi. The contention is that the Respondents registered office is at 31, Netaji Subhash Road, Calcutta and all payments have been made from there. Secondly, the site where the construction took place is in Haryana i.e. beyond the ordinary territorial jurisdiction of this Court. This objection in my opinion is also wholly without merit. The Respondent was served at his office in Sangam Cinema Complex, 3rd Floor, Sector-9, R.K.Puram, New Delhi. It stands admitted that the Branch/Delhi office was in operation at the material time at the said address. The Petitioner also has an office on 12th Floor, Vandana Building, 11 Tolstoy Marg, New Delhi. By a letter dated 14th November, 1996 the Respondent had requested the

Applicant to contact the Respondent's architect, namely, M/s Arvind Desraj & Associates, 75A, Sunder Nagar, New Delhi-110003. By means of this very letter the Respondents had informed the Applicant that the tender for the construction at Plot No.26, Sector 18, Electronic City, HSIDC, Gurgaon had been awarded to the Applicant. Therefore, the contract had come into existence in Delhi. Furthermore, it was a term of the contract that the Architect would certify the Applicant's bills, and payments would be released thereafter. The cause of action therefore indubitably arose in Delhi also. It has not been controverted that the Running Bills were submitted by the Applicant at the New Delhi office where they were verified by the Architect, and that payments were also received at New Delhi. In these circumstances, there can be no doubt that this Court possesses territorial jurisdiction to entertain and decide the present application.

6. It has next been contended that no Arbitration Clause has been signed between the parties. Section 2 (1) (b) of the Arbitration & Conciliation Act, 1996 refers the

reader to Section 7 which speaks of an Arbitration Agreement as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. Sub-section (2) of Section 7 clarifies that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Whilst sub-section (3) mandates that the arbitration agreement shall be in writing, the next sub-section clarifies that it can be contained in a document signed by the parties, or in correspondence between them or, most importantly, in a exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. The Respondent's own letter dated 14.11.1996 referred to terms and conditions contained in the tender. It also states that a formal agreement will be signed in due course. The Applicant has placed on record copies of the general instructions to the tenderers, agreement for the lump sum contract of civil works/plumbing works/electrical works/misc. works and the

General Conditions of Contract which comprises Clause 28 mentioned above. The Appendix to this Agreement contains the specifications. The Applicant has also issued a notice under Order XXII Rule 8 of the Code of Civil Procedure seeking production of the original Running Bills numbering 1 to 10 and the original contract executed by the parties on 31.10.1996; and original letters exchanged between the parties. Although the Respondent has stated that no such agreement has been executed, looking to the nature of the relationship of the parties, nature of the work contracted to be carried out by the Applicant for the Respondent, I am prima facie satisfied that the said agreement containing the Arbitration Clause had been signed by them. Certainly these documents were within the contemplation of the parties all throughout the period when construction was being carried out. This question is, therefore, left to be definitevely decided by the Arbitrator as envisaged in Section 16 of the Act. Even though similar objection as to the non-existence of an Arbitration Clause had been raised in **Rodemadan** India Limited vs. International Trade Expo Centre Limited, 2006(2) Arb.LR

83 (SC), Justice B.N.Srikrishna designate of the Hon'ble Chief Justice of India had referred the parties to arbitration. He specifically declined to record evidence on the bidding of the Objector/Respondent and thereby refer the designate of the Chief Justice into a Trial Court.

7. The Seven Judges Bench of the Hon'ble Supreme Court in S.B.P. and Co. vs. **Patel Engineering** Ltd., AIR 2006 SC 450 : (2005) 8 SCC 618 : JT 2005 (9) SC 219 : [2005] 128 Comp Cas 465(SC) : 2005 (3) Arb. LR 285 had recorded twelve conclusions of which the fourth is relevant for the present purposes. It had been observed thus:

> (i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under section 11(6) of the Act is not an administrative power. It is a judicial power.
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> (ii) The power under section 11(6) of the Act, in its entirety, could be delegated, by the Chief justice of the high Court only to another judge of that court and by the Chief Justice of India to another judge of the Supreme Court.
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> (iii) In case of designation of a judge of the High Court or of the Supreme Court, the power that is

exercised by the designated judge would be that of the Chief Justice as conferred by the statute.

(iv) The Chief Justice or the designated judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be, his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice of the judge designated would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the judge designate.

(v) Designation of a district judge as the authority under section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.

(vi) Once the matter reaches the arbitral tribunal or the sole arbitrator, the High Court would not interfere with orders passed by the arbitrator or the arbitral tribunal during the course of the arbitration proceedings and the parties could approach the court only in terms of section 37 of the Act or in

terms of section 34 of the Act.

(vii) Since an order passed by the Chief Justice of the High Court or by the designated judge of that court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution of India to the Supreme Court.

(viii) There can be no appeal against an order of the Chief Justice of India or a judge of the Supreme Court designated by him while entertaining an application under section 11(6) of the Act.

(ix) In a case where an arbitral tribunal has been constituted by the parties without having recourse to section 11(6) of the Act, the arbitral tribunal will have the jurisdiction to decide all matters as contemplated by section 16 of the Act.

(x) Since all were guided by the decision of this court in Konkan Railway corporation Ltd. v. Rani Construction P. Ltd. [2000] 8 SCC 159 and orders under section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or arbitral tribunals thus far made, are to be treated as valid, all objections being left to be decided under section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under section 11(6) of the Act.

(xi) Where District Judges had been designated by

the Chief Justice of the High Court under section 11 (6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications, if any, pending before them as on this date will stand transferred, to be dealt with by the Chief of the concerned High Court or a judge of that court designated by the Chief Justice.

(xii) The decision in Konkan Railway Corporation Ltd. v. Rani Construction P. Ltd. [2000] 8 SCC 159 is overruled.

8. The judgment does not state that a prima facie view cannot or should not be taken by the Judge seized with a Petition under Section 11. When the legislature specifically reposes this power on the Arbitrator, as per Section 16 of the Act, principles of statutory interpretation preclude the Court from rendering a definitive pre-decision on this question. The seven Judge Bench in **Patel Engineering** had been constituted to settle the question of whether the appointment of an Arbitrator was a ministerial or administrative or adjudicatory act. The answer that was given was that the Chief Justice or his designate is not bereft of judicial powers and that he must adjudicate

fundamental issues going to the very root of the existence of an Arbitration Clause or of an arbitral dispute. While it is true that their Lordships did not categorically articulate that a prima facie view could be taken by the Chief Justice or his designate, their Lordships did not state that such an approach cannot be adopted. The purpose of Section 16 is to clarify that disputes which pertain to the jurisdiction of the Arbitrator can very well be decided by the Arbitrator himself. The decision in **Rodemadan** India is a binding precedent. A harmonious statutory construction, in consonance with the views articulated in **Patel Engineering,** is that the Judge exercising jurisdiction under Section 11 must be prima facie satisfied that an Arbitration Clause exists and that disputes for arbitral adjudication also exist.

9. Finally it has been argued by Mr.K.R.Chawla, learned counsel for the Respondent that a full and final settlement between the parties had been arrived at and, therefore, there was no justification or occasion for referring the parties to Arbitration. Mr.Chawla has relied

on the decision in Bindra Builders vs. I.B.P.L. Group of Companies, 2001 (57) DRJ 848, in which I had occasion to consider this conundrum in some detail. In that case the claimant had issued a letter to the Respondent stating that the receipt of Rs.1,41,496/- would be towards full and final payment of dues in respect of the said construction. It had not been alleged by the Petitioner in those proceedings that the letter had been extracted from him and had, therefore, not been issued with his free consent. This decision is of no avail to the Respondent in the present case. On the contrary, the authorized signatory of the Respondent has placed the Respondent's letter dated 11.3.1999 on record, a perusal whereof shows that the sum of Rs.9,93,256/- was tendered "towards settlement of the following outstanding claims." This specifically acknowledges the existence of other claims. The last sentence leaves no room for doubt as it acknowledges the existence of "other claims for Rs.4 lacs (approx.) submitted by you and the architect, which prima facie are not acceptable." The only conclusion possible is that a sum of Rs.9,93,256/- had been paid leaving other demands open for resolution.

10. In these circumstances, no valid reasons have been disclosed to dissuade this Court from making an appointment of an Arbitrator. Accordingly the disputes between the parties are referred to the Sole Arbitration of Justice R.C. Chopra (Retd.). He shall be paid a fee of Rs.80,000/- to be shared equally between the parties. Parties to appear before the Sole Arbitrator on 25th September, 2006.

11. Arbitration Petition stands disposed of accordingly.

IA No.9583/1999 (Section 9 of the Arbitration & Conciliation Act, 1996)

12. The Orders dated 22nd September, 1999 are made absolute, without prejudice to the rights of the parties to approach the Sole Arbitrator for variance of the said Orders or for passing any other additional relief.

The application stands disposed of.

September 04, 2006
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(VIKRAMAJIT SEN)
JUDGE